

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RICHARD DUNN,

Plaintiff,

V.

CAROLYN W. COLVIN, Commissioner of
Social Security,

Defendant.

Case No. C13-5691-RSL-BAT

REPORT AND RECOMMENDATION

Mr. Dunn seeks review of the denial of his Disability Insurance Benefits applications. He contends the ALJ erred because (1) he failed to find Mr. Dunn's shoulder injury was a severe impairment at step two; (2) his adverse credibility finding was legally insufficient; (3) he improperly rejected the medical opinion of treating physician Dr. Thomas Rafferty; (4) his RFC statement was incomplete because he failed to include limitations identified by an examining physician whose opinion he gave "great weight"; and (5) he failed to provide legitimate reasons for disregarding the lay testimony of Mr. Dunn's wife. Dkt. 14. Mr. Dunn further contends the case should be remanded for payment of benefits, rather than for further administrative proceedings. As discussed below, the Court recommends the case be **REVERSED** and **REMANDED** for further administrative proceedings.

BACKGROUND

Mr. Dunn is currently 65 years old, has a high school education and two years of college, and has worked as a forest firefighter, education/custody supervisor, and building maintenance repairer. Tr. 33, 34, 58. On March 31, 2010, he applied for benefits, alleging disability as of March 31, 2010. Tr. 12. His applications were denied initially and on reconsideration. *Id.* The ALJ conducted a hearing on November 23, 2010, finding Mr. Dunn not disabled. Tr. 12-21. As the Appeals Council denied Mr. Dunn's request for review, the ALJ's decision is the Commissioner's final decision. *See* Tr. 1-6.

THE ALJ'S DECISION

Utilizing the five-step disability evaluation process,¹ the ALJ found:

Step one: Mr. Dunn had not engaged in substantial gainful activity since March 31, 2010.

Step two: Mr. Dunn had the following severe impairments: paroxysmal supraventricular tachycardia (“PSVT”); history of hiatal hernia repair; hyperlipidemia; and sinus bradycardia.

Step three: These impairments did not meet or equal the requirements of a listed impairment.²

Residual Functional Capacity: Mr. Dunn had the residual functional capacity to perform medium work as follows: he could lift up to fifty pounds occasionally and twenty-five pounds frequently and could perform unlimited pushing and pulling within these lifting restrictions; he could stand or walk for six out of eight hours per day and sit for six out of eight hours per day; he could occasionally climb ladders, ropes and scaffolds; he could frequently climb ramps or stairs and could frequently balance, stoop, crouch, kneel, or crawl; he could occasionally reach overhead with the right upper extremity. Mr. Dunn should avoid concentrated exposure to unprotected heights and the use of moving machinery.

Step four: Mr. Dunn could not perform his past work.

Step five: As there are jobs that exist in significant numbers in the national economy that

¹ 20 C.F.R. §§ 404.1520, 416.920.

² 20 C.F.R. Part 404, Subpart P. Appendix 1.

1 Mr. Dunn can perform, he is not disabled.

2 Tr. 12-21.

3 **DISCUSSION**

4 **A. The ALJ Did Not Err at Step Two**

5 At step two, the ALJ found Mr. Dunn “has a partial rotator cuff tear in his right shoulder.
6 However, there is no evidence that this will result in 12 months of impairment.” Tr. 15 (citations
7 omitted). Mr. Dunn contends the ALJ should have found Mr. Dunn’s shoulder injury was a
8 severe impairment, because there is no support for the ALJ’s assumption regarding the duration
9 of Mr. Dunn’s shoulder impairment. Dkt. 14 at 5-6.

10 At step two, Mr. Dunn must make a threshold showing that his medically determinable
11 impairments significantly limit his ability to perform basic work activities. *See Bowen v.*
12 *Yuckert*, 482 U.S. 137, 145, (1987); 20 C.F.R. §§ 404.1520(c). “Basic work activities” refers to
13 “the abilities and aptitudes necessary to do most jobs.” 20 C.F.R. §§ 404.1521(b). “An
14 impairment or combination of impairments can be found ‘not severe’ only if the evidence
15 establishes a slight abnormality that has ‘no more than a minimal effect on an individual’s ability
16 to work.’” *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996). “[T]he step-two inquiry is a
17 de minimis screening device to dispose of groundless claims.” *Id.* (*citing Bowen*, 482 U.S. at
18 153-54).

19 The ALJ found Mr. Dunn’s impairment failed the duration requirement; *i.e.*, that Mr.
20 Dunn had not demonstrated his impairment would last for a continuous period of twelve months.
21 Tr. 15. Under the twelve-month durational requirement set forth in 42 U.S.C. § 423(d)(1)(A),
22 the term “disability” means “the inability to engage in any substantial gainful activity by reason
23 of any medically determinable physical or mental impairment which can be expected to result in

1 death or which has lasted or which can be expected to last for a continuous period of not less
2 than 12 months.” Thus, an impairment that has not yet lasted twelve months but that is expected
3 to last that amount of time may meet the duration requirement. *Cf. Barnhart v. Walton*, 535 U.S.
4 212 (2002).

5 Mr. Dunn argues that the record shows he reported having pain for four months when he
6 obtained a consultation with a provider in September 2011. Dkt. 14 at 6 (*citing* Tr. 342). Results
7 from an October 2011 MRI reveal Mr. Dunn had glenohumeral joint osteoarthritis and a
8 moderate partial anterior bursal tear. Tr. 334. The MRI findings also described mild to
9 moderate irregularities; moderate “changes related to osteoarthritis”; and “moderate arthrosis...at
10 the AC joint.” Tr. 344. Mr. Dunn asserts that at the time of his hearing in November 2011, he
11 testified to having continued shoulder pain and to recently receiving cortisone shots. Dkt. 14 at 6
12 (*citing* Tr. 53). Mr. Dunn concludes “it is unclear why the ALJ thought that the impairment
13 would resolve in the next six months.” Dkt. 14 at 6.

14 Mr. Dunn has not met his burden to show he is likely to meet the durational requirement.
15 Although he has shown, and the ALJ found, he has a right shoulder impairment, there is scant
16 evidence that his impairment is likely to last twelve continuous months. While the Court is
17 required to examine the record as a whole, it may neither reweigh the evidence nor substitute its
18 judgment for that of the ALJ. *See Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002).
19 “Where the evidence is susceptible to more than one rational interpretation, it is the ALJ’s
20 conclusion that must be upheld.” *Morgan v. Comm’r, Soc. Sec. Admin.*, 169 F.3d 595, 599 (9th
21 Cir. 1999) (*citing Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995)). Mr. Dunn may offer
22 a reasonable interpretation of the record, but the ALJ’s conclusion was also reasonable.

23 As the Commissioner notes, even if Mr. Dunn could provide medical evidence indicating

1 his injury was likely to last twelve months, Mr. Dunn points to no evidence to suggest the
2 shoulder injury had more than a minimal effect on his ability to work or that it has prevented him
3 from engaging in basic work activities. *See* Dkt. 19 at 6. Though Mr. Dunn requests that the
4 Court ignore this argument because it is a “*post hoc* rationalization that was not raised by the
5 ALJ in connection with his Step 2 decision,” the Court disagrees. The very next sentence in the
6 ALJ’s decision states “[t]he undersigned has considered these medically determinable
7 impairments and determined that they do not significantly impact the claimant’s ability to
8 perform work-related activity, and therefore are nonsevere impairments under 20 CFR
9 404.1520(c).”

10 Accordingly, the Court cannot say the ALJ erred in finding Mr. Dunn’s shoulder
11 impairment was not severe. The Court recommends affirming the ALJ’s step two findings with
12 respect to this impairment.

13 **B. The ALJ Erred in Assessing Mr. Dunn’s Credibility**

14 Where, as here, there is no evidence of malingering, an ALJ must provide clear and
15 convincing reasons to reject a claimant’s testimony. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036
16 (9th Cir. 2007). The ALJ discounted Mr. Dunn’s credibility because he found it was inconsistent
17 with his activities of daily living. Tr. 18. In particular, he found that Mr. Dunn was not credible
18 because he wakes early and has breakfast with his wife before checking emails or mowing the
19 lawn; he keeps, cares for, and rides horses; he lifts heavy (40-50 pound) bales of hay; performs
20 housework and yard work; he reads books; cares for his pet dogs and cats; and he is able to walk
21 or drive to shop for groceries. Tr. 18. The Ninth Circuit “has repeatedly asserted that the mere
22 fact that a plaintiff has carried on certain daily activities, such as grocery shopping, driving a car,
23 or limited walking for exercise, does not in any way detract from [his] credibility as to [his]

1 overall disability. One does not need to be ‘utterly incapacitated’ in order to be disabled.”
 2 *Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th Cir. 2001) (*quoting Fair v. Bowen*, 885 F.2d 597,
 3 603 (9th Cir. 1989)). However, a claimant’s reported daily activities can form the basis for an
 4 adverse credibility determination if they consist of activities that contradict the claimant’s “other
 5 testimony”; or that are transferable to a work setting.” *Orn v. Astrue*, 495 F.3d 625, 639 (9th
 6 Cir.2007); *Smolen v. Chater*, 80 F.3d 1273, 1284 n.7 (9th Cir. 1996).

7 The Commissioner contends “the ALJ determined that Plaintiff’s description of his daily
 8 activities contradicted [sic] his other testimony that his physical impairments prevented him from
 9 working.” Dkt. 19 at 10. The Commissioner is correct, and therein lies the problem: the ALJ’s¹
 10 entire discussion is merely a summary of some of Mr. Dunn’s medical history, followed by a
 11 conclusion that Mr. Dunn is not credible because the extent of his activities of daily living “is
 12 inconsistent with the claimant’s allegation that he is so disabled as to be unable to work.” Tr. 18.
 13 But the ALJ fails to identify where in Mr. Dunn’s testimony a contradiction arose. *See, e.g.*,
 14 *Molina v. Astrue*, 674 F.3d 1104, 1112 (9th Cir. 2012) (ALJ properly found claimant’s claimed
 15 inability to “tolerate even minimal human interaction was inconsistent with her daily
 16 activities...including walking her two children to and from school, attending church, shopping,
 17 and taking walks. . .”). Merely reciting Mr. Dunn’s medical history accomplishes only part of
 18 the job.

19 The Commissioner concedes the ALJ “made not [sic] finding on the transferability of the
 20 activities” at issue, Dkt. 19 at 10, the only other acceptable grounds for using daily activities to
 21 form the basis of an adverse credibility determination. *See Orn*, 495 F.3d at 639. The ALJ must
 22 make “specific findings relating to [the daily] activities” and their transferability to conclude that
 23 a claimant’s daily activities warrant an adverse credibility determination. *Burch v. Barnhart*, 400

1 F.3d 676, 681 (9th Cir. 2005). On this record, the Court concludes that further development of
2 either or both permissible grounds for using daily activities to form the basis of an adverse
3 credibility determination is required if Mr. Dunn's activities of daily living are to be relied upon
4 as part of an adverse credibility determination.

5 Generally, when a plaintiff challenges only some of the reasons relied upon by an ALJ in
6 discounting the plaintiff's credibility, the Court engages in a harmless error analysis. This is
7 because including an erroneous reason among other reasons to discount a claimant's testimony
8 does not negate the validity of the overall credibility determination. *See Carmickle v. Comm'r of*
9 *Soc. Sec. Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2008). Those other reasons must be clear and
10 convincing and supported by substantial evidence in the record. *See, e.g., Light v. Soc. Sec.*
11 *Admin.*, 119 F.3d 789, 792 (9th Cir. 1997) ("In weighing a claimant's credibility, the ALJ may
12 consider . . . inconsistencies either in his testimony or between his testimony and his conduct,
13 his daily activities, his work record, and testimony from physicians and third parties concerning
14 the nature, severity, and effect of the symptoms of which he complains.").

15 The ALJ's decision contained other findings the ALJ apparently relied upon in
16 discounting Mr. Dunn's credibility, but those findings cannot be characterized as clear and
17 convincing—in fact, they can hardly be characterized as “reasons.” Rather, the portion of the
18 ALJ's decision professing to contain the ALJ's reasons for rejecting Mr. Dunn's symptom
19 allegations reads more like a summary of Mr. Dunn's record. The ALJ discusses Mr. Dunn's
20 history of hyperlipidemia and paroxysmal supraventricular tachycardia, relaying Dr. Craig
21 Wehrli, M.D.'s medical findings in 2010 and 2011. Tr. 17-18. The ALJ next discusses Mr.
22 Dunn's visit to St. Peter Hospital in March 2011 for test pain regarding chest pain, relaying he
23 was discharged in stable condition and with no abnormal radiographs. Tr. 18. The ALJ also

1 discusses Mr. Dunn's history of hernia repair, stating "physical examinations of the claimant
 2 have revealed normal signs and the claimant is not significantly limited by this impairment." Tr.
 3 18.

4 But the ALJ makes no link between his summary findings from the medical record and
 5 his conclusions that Mr. Dunn is not credible. Credibility findings "must be sufficiently specific
 6 to allow a reviewing court to conclude the ALJ rejected the claimant's testimony on permissible
 7 grounds and did not arbitrarily discredit the claimant's testimony." *Moisa v. Barnhart*, 367 F.3d
 8 882, 885 (9th Cir. 2004). "We require the ALJ to build an accurate and logical bridge from the
 9 evidence to her conclusions so that we may afford the claimant meaningful review of the SSA's
 10 ultimate findings." *Blakes v. Barnhart*, 331 F.3d 565, 569 (7th Cir. 2003); *see also Lester v.*
 11 *Chater*, 81 F.3d 821, 834 (9th Cir. 1996) ("General findings are insufficient; rather, the ALJ
 12 must identify what testimony is not credible and what evidence undermines the claimant's
 13 complaints.").

14 "Long-standing principles of administrative law require [this Court] to review the ALJ's
 15 decision based on the reasoning and factual findings offered by the ALJ—not post hoc
 16 rationalizations that attempt to intuit what the adjudicator may have been thinking." *Bray v.*
 17 *Comm'r, Soc. Sec. Admin.*, 554 F.3d 1219, 1225–26 (9th Cir. 2009). The ALJ did not provide
 18 any legally adequate reason to reject Mr. Dunn's credibility. Remand is warranted on this issue.

19 **C. The ALJ Erred in Rejecting the Opinion of Dr. Thomas Rafferty, M.D.**

20 Mr. Dunn also argues the ALJ erred in rejecting his treating doctor's opinion that Mr.
 21 Dunn should not perform the pack test because he "should not push himself at his age given his
 22 hypertension and PAT." Dkt. 14 at 3, Tr. 232. The ALJ assigned "some weight" to Dr. Thomas
 23 Rafferty, M.D.'s opinion "to the extent it is consistent with the residual functional capacity and

1 this decision.” Tr. 18. The ALJ found “Dr. Rafferty evaluated the claimant’s heart condition
 2 and his other physical impairments. Dr. Rafferty reported that the claimant’s hypertension was
 3 well-controlled with medications and he considered the claimant’s past hernia repair in his
 4 findings.” *Id.* The fails to address the portion of the progress note in September 2009 that states
 5 “he probably should not push himself at his age given his hypertension and PAT” regarding the
 6 “pack test.”³ *See* Tr. 18; *see also* Tr. 231-232.

7 As a general rule, more weight is accorded to the opinion of a treating physician than to a
 8 non-treating physician. *Lester*, 81 F.3d at 830. An ALJ must provide “clear and convincing”
 9 reasons for rejecting the uncontradicted opinion of a treating or examining physician. *Id.* The
 10 ALJ’s decision must “contain specific reasons for the weight given to the treating source’s
 11 medical opinion, supported by the evidence in the case record, and must be sufficiently specific
 12 to make clear to any subsequent reviewers the weight the adjudicator gave to the [] opinion and
 13 the reasons for that weight.” SSR 96-2p.⁴ Here, as the ALJ gave no reasons to reject any portion
 14 of Dr. Rafferty’s opinion, he failed to provide clear and convincing reasons. *Lester*, 81 F.3d at
 15 830.

16 The Commissioner contends Mr. Dunn has failed to show harmful error because Dr.
 17 Rafferty “did not opine that [Mr. Dunn] was incapable of the ‘pack test’” and in fact there is no

18 ³ The Court notes that simultaneous treatment notes by Drs. Rafferty and Craig Wehrli, M.D.,
 19 refer to Mr. Dunn’s tachycardias as PAT and PSVT, respectively. Compare Tr. 231 with Tr.
 20 242. The ALJ does not discuss PAT whatsoever.

21 ⁴ Although “Social Security Rulings do not have the force of law, [n]evertheless, they constitute
 22 Social Security Administration interpretations of the statute it administers and of its own
 23 regulations.” *See Quang Van Han v. Bowen*, 882 F.2d 1453, 1457 (9th Cir. 1989) (*citing Paxton*
v. Sec. HHS, 865 F.2d 1352, 1356 (9th Cir. 1988)); *Paulson v. Bowen*, 836 F.2d 1249, 1252 n.2
 (9th Cir. 1988)) (internal citation and footnote omitted). As stated by the Ninth Circuit, “we
 defer to Social Security Rulings unless they are plainly erroneous or inconsistent with the [Social
 Security] Act or regulations.” *Id.* (*citing Chevron USA, Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-
 45 (1984)).

1 evidence he was aware of the requirements of the pack test, and because Mr. Dunn cannot show
 2 that a restriction against performing the pack test precludes him from medium work. Dkt. 19 at
 3 4-5. The Commissioner's arguments are not persuasive. Though it is true that “[w]here the
 4 evidence is susceptible to more than one rational interpretation, it is the ALJ's conclusion that
 5 must be upheld,” *Morgan v. Comm'r, Soc. Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999), the
 6 Court cannot determine whether the ALJ's decision regarding Dr. Rafferty's assessment was
 7 rational, because he provided no basis for discounting his opinion.⁵ The Commissioner's
 8 harmless error analysis is speculative at best. There is no discussion in the ALJ's decision
 9 finding Dr. Rafferty's statement that Mr. Dunn “probably should not push himself” had nothing
 10 to do with the pack test; there is no evidence to suggest Dr. Rafferty was *not* aware of the
 11 requirements of the pack test, particularly because the same notes refer to an “arduous pack test,”
 12 Tr. 231, and because Mr. Dunn testified he discussed the pack test with his provider; Tr. 42, and
 13 the ALJ made no findings that Dr. Rafferty's restriction against performing the pack test was not
 14 inconsistent with Mr. Dunn's RFC. In short, though it may be the case that clear and convincing
 15 reasons exist to discount Dr. Rafferty's opinion, the ALJ has failed to provide them. On remand,
 16 the ALJ shall reassess the opinion of Dr. Rafferty, and either credit it in full, or provide clear and
 17 convincing reasons for discounting it.

18 **D. The ALJ Erred in Evaluating the Opinion of Dr. James Parker, M.D.**

19 Mr. Dunn next contends the ALJ erred by finding his mental impairments non-severe,

20 ⁵ Cf. *Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1162-63 (9th Cir. 2008) (where the
 21 ALJ provides specific reasons supporting an assessment and substantial evidence supports the
 22 conclusion, an error in the assessment may be deemed harmless; the relevant inquiry “is not
 23 whether the ALJ would have made a different decision absent any error, . . . [but] whether the
 ALJ's decision remains legally valid, despite such error.”) (citing *Batson v. Comm'r, Soc. Sec. Admin.*, 359 F.3d 1190, 1195-97 (9th Cir. 2004)). In other words, the harmless error inquiry is
 relevant and appropriate when an ALJ provides legally sufficient reasons supporting his
 assessment, which are also supported by substantial evidence in the record.

1 and subsequently failing to limit Mr. Dunn to simple, repetitive tasks due to mental limitations.
 2 *See* Dkt. 14 at 10-11. In specific, Mr. Dunn contends that Dr. James Parker, M.D., who
 3 “diagnosed bipolar disorder and anxiety disorder with obsessive compulsive symptoms,” also
 4 opined that Mr. Dunn should be “limited to simple/repetitive tasks,” which the ALJ ignored. *Id.*
 5 (*citing* Tr. 45-46). Mr. Dunn also contends that Samuel Keith, ARNP, concluded that Mr. Dunn
 6 “requires further stabilization of his current treatment for bipolar and would benefit from either a
 7 significant change in the requirements of his work or an allowance of retirement due to
 8 disability,” which the ALJ rejected. Dkt. 14 at 10; *see also* Tr. 18-19. The Court interprets Mr.
 9 Dunn’s arguments as directed at the ALJ’s assessment of the medical opinion evidence and other
 10 medically-related opinion evidence, and addresses them as such.

11 **1. Dr. James Parker, M.D.**

12 In finding Mr. Dunn’s bipolar affective disorder and anxiety disorder non-severe, the ALJ
 13 cited the psychiatric consultative examination performed by Dr. Parker in July 2010, and
 14 psychiatric counseling progress notes performed in February and April 2011.⁶ Tr. 15 (*citing* Tr.
 15 253, 327-328). The ALJ assigned “great weight” to Dr. Parker’s opinion, but neither addressed
 16 Dr. Parker’s opinion that Mr. Dunn should be limited to simple, repetitive tasks; nor incorporated
 17 that opinion in his RFC determination.⁷ Tr. 18. The ALJ also assigned “great weight” to the
 18 opinions of John Robinson, Ph.D.,⁸ and Edward Beaty, Ph.D., who found that Mr. Dunn was not

19
 20 ⁶ These notes are practically illegible and contain very little content, but, as recognized by the
 21 ALJ, state “mood is stable.” Tr. 15.

22 ⁷ In totality, the ALJ’s discussion of Dr. Parker states: “The opinion of James Parker, M.D., is
 23 assigned great weight. Dr. Parker performed a psychiatric consultative examination and opined
 24 that the claimant’s bi-polar disorder is well-managed and that his mental health conditions are
 25 currently under good control. The opinion of Dr. Parker is assigned great weight because it is
 26 consistent with the medical evidence of record and based on the doctor’s objective observations.”
 27 Tr. 18.

28 ⁸ The ALJ’s citation to Tr. 294 is in error. John Robinson’s review of Edward Beaty’s

1 significantly limited after reviewing the treatment notes from Dr. Parker and Mr. Keith. Tr. 19
 2 (*citing* Tr. 254-266; Tr. 294). Notably, Mr. Beaty's notes repeat Mr. Parker's medical source
 3 opinion that "[c]lmt can perform simple/repetitive tasks at a normal pace & accuracy." Tr. 266.

4 In addition to providing "clear and convincing" reasons for rejecting an uncontradicted
 5 opinion of a treating or examining physician, *see Lester*, 81 F.3d at 830, an ALJ must also
 6 explain why "significant probative evidence has been rejected."⁹ *Id.* Because the ALJ gave no
 7 reason to reject the portions of Dr. Parker's opinion he found inconsistent with the medical
 8 evidence of record, he failed to provide reasons that were clear and convincing.

9 The Commissioner contends the ALJ's failure to incorporate Dr. Parker's assessed
 10 limitations into Mr. Dunn's RFC was harmless error because the jobs identified by the
 11 Vocational Expert, with a Specified Vocational Preparation ("SVP") of two, are consistent with
 12 simple, repetitive tasks. Dkt. 19 at 12. Mr. Dunn argues "the SVP does not address the nature of
 13 the tasks involved in a job, but merely the amount of training time necessary to learn the job."
 14 Dkt. 20 at 8. The Court agrees. Though the Ninth Circuit has not decided the issue, the Western
 15 District of Washington and other courts have concluded that the SVP in a DOT listing indicating
 16 unskilled work does not address whether the job entails simple, repetitive tasks. *See, e.g.*,
 17 *Wesselius v. Astrue*, 2012 WL 4758067 *6 (W.D.Wash. 2012); *Blakley v. Astrue*, 2009 WL
 18 279029, at *6 (W.D.Wash. 2009); *Meissl v. Barnhart*, 403 F.Supp.2d 981, 982-83 (C.D.Cal.
 19 2005); *Cooper v. Barnhart*, 2004 WL 2381515, at *4 (N.D.Okla. 2004); *Hall v. Barnhart*, 2004
 20 WL 1896969, at *3 (D.Me. 2004); *see also Lucy v. Chater*, 113 F.3d 905, 909 (8th Cir. 1997)

21 psychiatric review is found at Tr. 295.

22 ⁹ An addition, according to SSR 96-8p, a residual functional capacity assessment by the ALJ
 23 "must always consider and address medical source opinions. If the RFC assessment conflicts
 with an opinion from a medical source, the adjudicator must explain why the opinion was not
 adopted." *See* SSR 96-8p.

1 (noting that reasoning level must be considered separately from a listing of unskilled work). The
 2 Western District has noted:

3 A job's SVP is focused on "the amount of lapsed time" it takes for
 4 a typical worker to learn the job's duties. DOT at 1009. A job's
 5 reasoning level, by contrast, gauges the minimal ability a worker
 6 needs to complete the job's tasks themselves. As one court noted,
 7 "SVP ratings speak to the issue of the level of vocational
 8 preparation necessary to perform the job, not directly to the issue
 9 of a job's simplicity, which appears to be more squarely addressed
 10 by the GED [reasoning level] ratings." *Hall-Grover v. Barnhart*,
 11 2004 WL 1529283, at *4 (D.Me. April 30, 2004). Here, the one
 12 vocational consideration directly on point with the limitation
 13 contained in the RFC is a job's reasoning level score.

14 *Blakley*, 2009 WL 279029, at *6. Accordingly, the Commissioner's argument is without merit.
 15 The Court finds the ALJ committed harmful legal error. On remand, the ALJ should reevaluate
 16 Dr. Parker's opinion.

17 **2. Samuel Keith, ARNP**

18 The ALJ also assigned "little to some weight" to the opinion of Mr. Dunn's treating nurse
 19 practitioner. Nurse practitioners are considered "other medical sources," whose opinions must
 20 be considered by the ALJ and can be rejected only upon providing germane reasons. *See*
 21 *Molina*, 674 F.3d at 1114. The ALJ may evaluate opinions of other sources using the same
 22 factors applied to evaluate medical opinions of acceptable medical sources. *See* 20 C.F.R. §§
 23 404.1513(a) and (d), SSR 06-03p; *Molina*, 674 F.3d at 1111. These factors include the length
 and frequency of the treating relationship, how consistent the opinion is with other evidence, the
 evidence the source presents to support the opinion, how well the source explains the opinion,
 whether the source has a specialty or area of expertise related to the impairment, and any other
 relevant factors. *Id.* But the ALJ may give less weight to opinions of other sources than to those
 of acceptable medical sources. *Id.*

1 The ALJ rejected the opinion of Samuel Keith because “[h]e opined that the claimant
 2 would benefit from either a significant change in the requirements of his work or an allowance of
 3 retirement due to disability, but also opined in April 2011 that the claimant’s mood was stable.”
 4 Tr. 19. While hardly a model of clarity, the Court interprets the ALJ’s statement to suggest he
 5 found the opinion was inconsistent with Mr. Keith’s treatment notes, which is a germane reason
 6 to discount his opinions. Accordingly, the Court finds the ALJ did not err in discounting Mr.
 7 Keith’s opinions.

8 **E. The ALJ Erred in Evaluating the Lay Witness Testimony of Yvonne Dunn**

9 Mr. Dunn next challenges the ALJ’s assessment of his wife’s third-party function report.
 10 Dkt. 14 at 9-10. The ALJ assigned “great weight” to Mrs. Dunn’s opinions to the extent her
 11 opinions were consistent with his RFC assessment. Tr. 19. In Mr. Dunn’s view, in crediting
 12 Mrs. Dunn’s opinions to the extent they were consistent with the RFC, the ALJ rejected, without
 13 explanation, Mrs. Dunn’s observations of her husband’s increasing difficulties focusing,
 14 completing tasks, and engaging in normal social behaviors. *See* Dkt. 14 at 9. The Commissioner
 15 argues that any error was harmless because Mrs. Dunn “did not describe any limitations beyond
 16 what Plaintiff described,” and because “Plaintiff arguably described daily activities that were less
 17 restrictive than those described by his wife.”¹⁰ Dkt. 19 at 11.

18 Mrs. Dunn is also considered an “other source” under the Social Security regulations, and
 19 therefore an ALJ may only reject her opinion for “germane” reasons. *See* 20 C.F.R. §§
 20 404.1513(a) and (d), SSR 06-03p; *Molina*, 674 F.3d at 1111. Though the ALJ acknowledged
 21 that Mrs. Dunn testified her husband was “becoming increasingly difficult and exhibiting trouble

22 ¹⁰ Compare Tr. 180 and Tr. 188. In describing daily activities, Mrs. Dunn contends Mr. Dunn
 23 “stays around the house most of the time,” while Mr. Dunn’s more specific description describes
 activities such as showering, feeding pets, watching TV, reading the newspaper, and going to his
 daughter’s house.

1 with others, such as ridiculing others," Tr. 19, the ALJ failed to explain how his RFC assessment
 2 accounts for these impairments and the others identified by Mrs. Dunn, *despite assigning her*
 3 *opinion "great weight."* Germane reasons may exist to discount that opinion, but the ALJ did not
 4 provide any, and thereby erred. *See Smolen*, 80 F.3d at 1288-89 (holding that the ALJ can reject
 5 the testimony of lay witnesses only upon giving germane reasons).

6 The Commissioner's argument that any error is harmless is not persuasive. If anything,
 7 Mrs. Dunn did describe limitations beyond what Mr. Dunn described, and the Commissioner
 8 points to nothing in the record to demonstrate the contrary.¹¹ The ALJ's failure to directly
 9 address and reject this portion of the lay witness testimony was not harmless error.

10 Thus, on remand the ALJ shall reassess Mrs. Dunn's opinions, either accounting for the
 11 functional limitations contained in her opinion in the RFC assessment, or providing germane
 12 reasons to discount them.

13 **F. Remand**

14 Finally, Mr. Dunn contends this case should be remanded for payment of benefits. Dkt.
 15 14 at 4-5. The Court has discretion to remand for further proceedings or to award benefits. *See*
 16 *Marcia v. Sullivan*, 900 F.2d 172, 176 (9th Cir. 1990). The Court may direct an award of
 17 benefits where "the record has been fully developed and further administrative proceedings
 18 would serve no useful purpose." *McCartey v. Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002).

19 Such a circumstance arises when: (1) the ALJ has failed to provide
 20 legally sufficient reasons for rejecting the claimant's evidence; (2)
 21 there are no outstanding issues that must be resolved before a

22 ¹¹ Mrs. Dunn's third-party function report contains her observations that her husband of 41 years
 23 had trouble focusing, Tr. 180, he could not complete tasks, Tr. 181, he "can't get a task done
 usually" and she has to finish them, Tr. 182, he makes frequent errors in managing finances, Tr.
 183-84, he is becoming less social and more irritable, Tr. 184-85, he is combative. Tr. 186, and
 he could not handle stress, *Id.*

1 determination of disability can be made; and (3) it is clear from the
2 record that the ALJ would be required to find the claimant disabled
3 if he considered the claimant's evidence.

4 *Id.* at 1076–77.

5 In this case, the first criterion has been satisfied, as the Court has identified multiple
6 errors in the ALJ's analysis of the evidence. As to the second and third criteria, however, it is not
7 clear that even if the erroneously discounted or rejected evidence were credited, the ALJ would
8 be required to find the claimant disabled, primarily because it is not clear that the ALJ's ultimate
9 conclusions will be any different after providing proper reasons for rejecting, or even accepting,
10 certain opinions and testimony. Accordingly, the Court recommends the case be remanded for
11 additional proceedings.

12 CONCLUSION

13 For the foregoing reasons, the Court recommends that the Commissioner's decision be
14 **REVERSED** and the case be **REMANDED** for further administrative proceedings pursuant to
15 sentence four. On remand, the ALJ should reevaluate Mr. Dunn's credibility, the opinion of Dr.
16 Thomas Rafferty, the opinion of Dr. James Parker, and the opinions contained in Mrs. Dunn's
17 third-party function report. As necessary, the ALJ shall supplement the record, revise Mr.
18 Dunn's maximum RFC, and conduct new step four and step five assessments.

19 A proposed order accompanies this Report and Recommendation. Objections, if any, to
20 this Report and Recommendation must be filed and served no later than **April 23, 2014**. If no
21 objections are filed, the matter will be ready for the Court's consideration on **April 24, 2014**. If
22 objections are filed, any response is due within 14 days after being served with the objections. A
23 party filing an objection must note the matter for the Court's consideration 14 days from the date
the objection is filed and served. Objections and responses shall not exceed twelve pages. The

1 failure to timely object may affect the right to appeal.

2 DATED this 9th day of April, 2014.

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6 BRIAN A. TSUCHIDA
7 United States Magistrate Judge
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